STATE REPRESENTATIVE
FREDERICK P. KESSLER

WISCONSIN STATE ASSEMBLY 12TH DISTRICT

Statement of State Representative Frederick P. Kessler
Assembly Committee on Labor
Wisconsin Capitol—Room 225 Northwest
Wednesday, January 13, 2010
Assembly Bill 609 - vacating an award following arbitration pursuant to a collective bargaining agreement

Arbitration is intended as a less costly and time-consuming alternative to the courts. It can only function this way, though, if arbitration awards are treated as final – if the parties come to view arbitration as just one step on the way to the courthouse, it saves no money and no time.

In light of the advantages of arbitration, courts have for many years refused to entertain claims that a particular arbitration award is simply wrong on the facts or on the law. There are a few circumstances in which an award may be overturned: if it was obtained by fraud or there was some kind of malfeasance by the arbitrator, for example. Generally, however, the courts do not second-guess an arbitrator on the merits of the case. This doctrine is now codified in Wis. Stat. § 788.10(d).

In the past few years, though, Wisconsin's appellate courts seem to be eroding this traditional doctrine by finding certain arbitration awards contrary to "public policy." "Public policy" is obviously a fairly amorphous concept, and one which allows a court to overturn nearly any result that it does not like. Traditionally, courts have stated that the "public policy" exception to the enforcement of arbitration awards applies only where an award actually would require a party to violate some clear law. In fact, the Wisconsin Court of Appeals has said just that in the past. However, in recent cases, the court seems to be drifting away from this rule – reaching out to overturn valid arbitration awards on the basis of court-proclaimed "public policy."

AB 609 serves to protect the finality, and therefore the value, of arbitration by explicitly writing the traditional doctrine into the statute. A court would still be able to invalidate an arbitration award if it was procured by fraud or other undue means, or in the case of misconduct by the arbitrator. A court would also, of course, be free to reverse an award that would require a party to violate a statutory or constitutional provision. A court could not, however, substitute its own judgment for that of the arbitrator by relying on a vague notion of public policy.

When I became concerned about the apparent trend in appellate cases last winter, I asked a group of labor and government attorneys to discuss ways to preserve the vitality of arbitration. Many different perspectives were eventually represented in this discussion: labor attorneys, management attorneys, and arbitrators, as well as representatives from the state bar, the Wisconsin Employment Relations Commission, and the Wisconsin Counties Association all participated. We held several meetings over a period of months to craft language that would be precise and workable.

I believe that we succeeded. I therefore urge the Committee to recommend passage of Assembly Bill 609. I will now be happy to answer any questions that members may have.

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THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION

MEMORANDUM

TO: Member of the Assembly Committee on Labor

FROM: Jim Palmer, Executive Director JLP

DATE: January 13, 2010

RE: Support of 2009 Assembly Bill 609

With nearly 11,000 members, the Wisconsin Professional Police Association (WPPA) is the state's largest law enforcement organization. Our mission is to protect and promote public safety, as well as the interests of the dedicated men and women who serve to provide it. The WPPA genuinely appreciates this opportunity to offer our enthusiastic support to this important legislation.

Wisconsin's judicial system has a long-standing history of deferring to arbitration decisions that settle labor conflicts between employers and their employees. This is due to the fact that arbitration is generally respected as a final and binding method of dispute resolution. Arbitration is viewed as a final destination at which labor disputes are decided, not merely one stop on a longer and more expensive journey that spans the state's courts. Issues of contract interpretation ought to be resolved by skilled and knowledgeable labor arbitrators, not judges who have less experience in labor matters and who face an ever-growing backlog of cases. Any other result would render the arbitration process largely meaningless and would foster a financial arms race in which the deepest pockets will always maintain an advantage.

Assembly Bill 609 would make clear that an arbitrator's decision can only be overturned if he or she requires a party to a labor dispute to violate a state law or constitutional provision, or if the arbitrator expressly disregards specific contractual language governing the dispute. This is consistent with the judicial and administrative history surrounding labor disputes in this state, as well as with case law precedent. AB 609 protects the public policies behind Wisconsin's arbitration laws, and discourages the kind of judicial activism that would only serve to undermine this state's proud tradition of effectively resolving contentious labor disputes.

As such, the WPPA respectfully requests that this committee quickly approve AB 609 so that it can be considered by the full Assembly.

Thank you.

WISCONSIN ASSOCIATION OF SCHOOL BOARDS

122 W. Washington Avenue, Madison, WI 53703
Phone: 608-257-2622 • Fax: 608-257-8386

John H. Ashley, Executive Director

TO: Assembly Committee on Labor

FROM: Sheri Krause, Government Relations Specialist

DATE: January 13, 2010

RE: Assembly Bill 609, relating to vacating an award following arbitration pursuant to a collective bargaining agreement

The Wisconsin Association of School Boards **opposes Assembly Bill 609**, which would limit the ability for a court to vacate an arbitration decision pursuant to a collective bargaining agreement.

Of primary concern to the WASB is the proposed elimination of the ability to overturn an arbitration award when an arbitrator exceeds his or her powers by issuing an award that violates a strong public policy. By specifically defining when an arbitrator exceeds his or her powers without mentioning a violation of strong public policy, Assembly Bill 609 removes a violation of strong public policy as a reason for vacating an arbitration award.

Wisconsin has a strong legislative policy favoring arbitration as a settlement tool when disputes arise between labor organizations and municipal employers. However, the Wisconsin Supreme Court has long recognized that a court may vacate an arbitration award "if the award itself is illegal or violates strong public policy."

The WASB believes strongly that in the interest of protecting children, neither party should be excluded from challenging an arbitration award if it is believed that the award violates strong public policy. The safety of our children should be given priority over the employment interests of adults.

One of the cases cited to the WASB as a reason for supporting this legislation is *Zellner v. Cedarburg School District*. However, the WASB believes this case illustrates the need to retain current law.

In *Zellner v. Cedarburg*, a teacher was fired for purposefully accessing pornographic material on his school computer. An arbitrator deemed the penalty too harsh and ordered the school board to reinstate him with back pay. The school board challenged the arbitrator's decision and succeeded

in overturning it at the circuit court level on the grounds that it violated strong public policy. The teacher appealed, but the appeals court affirmed the circuit court's decision. The teacher appealed again, but the Wisconsin Supreme Court declined to hear the case and the school board's decision to terminate the teacher was upheld. Throughout the appeals process, the courts repeatedly stated that the "arbitration award violated the strong public policy against immoral conduct in schools."

The WASB believes this case illustrates the need to retain current law and the ability to challenge an arbitration award on public policy grounds. School boards do not often seek to vacate an arbitration award, it is a time-consuming and costly process with no guarantee of success. However, school boards have an obligation to govern public education in a manner which reflects the public policy concerns of their communities and they should retain the full use of the judicial system to do so.

We ask that you do not advance Assembly Bill 609. Thank you.

WISCONSIN EDUCATION ASSOCIATION COUNCIL

Affiliated with the National Education Association

Great Schools benefit Everyone!

To: Members of the Assembly Labor Committee

From: Wisconsin Education Association Council

Date: January 13, 2010

Re: Support for Assembly Bill 609, relating to standards for judicial review of arbitration awards

The Wisconsin Education Association Council supports Assembly Bill 609 to promote labor arbitration as a more rational and inexpensive alternative to strikes of public sector employees.

Public employers and their unions have agreed through collective bargaining to allow labor arbitrators to resolve all their differences, from routine disputes about pay to discharges of employees accused of serious misconduct including forms of illegal conduct.

Courts have established what appear to be a strict set of principles limiting review of arbitration awards to extreme cases involving a "perverse misconstruction or positive misconduct, when the arbitrator manifestly disregards the law, when the award is illegal, or when the award violates a strong public policy."[1] In recent years, there has been an increase in the number of cases municipal employers have filed seeking to set aside arbitration decisions under these principles. For WEAC alone, there have been four such cases filed in the last few years.

In each of these cases, courts pay lip service to the principle that courts should not second-guess labor arbitrators, but then proceed to do just that. Unfortunately, the principles of limited judicial review of arbitration developed in the case law lack sufficient clarity to discourage these challenges. Judges differ sharply over their application. For example, the Wisconsin Supreme Court has been divided 4-3 and 7-1 in the two most recent labor arbitration cases it has decided.[2] In both of these cases, the Supreme Court reversed decisions of three judge panels of the Court of Appeals.

US Supreme Court Justice White once famously observed in struggling to define pornography, "I know it when I see it." The same can be said for judges who apply the "perverse misconstruction" standard in labor arbitration cases. This term is so vague that it amounts to an invitation to base decisions on a judge's personal values rather than the law.

Assembly Bill 609 is designed to bring clarity to the process by clearly setting forth the standards a judge must

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[1] Racine County v. Machinists District 10, 2008 WI 70, ¶ 34.

[2] Racine County v. Machinists District 10, supra, and Baldwin-Woodville Area School District v. West Central Education Association-Baldwin Woodville Unit, 2009 WI 51.

Mary Bell, President
Dan Burkhalter, Executive Director

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apply in deciding whether to overturn an arbitrator's decision. Subsection (d)(1) of the legislation permits an award to be overturned in only two situations: (1) where it "requires a party to violate a state statute or constitutional provision" or (2) where the arbitrator "expressly disregards contractual language governing the dispute."

The first requirement would deter challenges to arbitration awards on the grounds that they violate vague public policies—a rationale which makes it easy for judges to base their decisions on their own notions of what is right or wrong. Under current state law, judges are permitted to examine the nature of an employee's conduct in determining whether an arbitrator's decision should be upheld. If a judge disagrees with an arbitrator's assessment of "immoral conduct," the decision can be set aside.[3]

The US Supreme Court has expressly rejected this approach. In a case involving the reinstatement of an employee who used illegal drugs, it held that "the question to be answered is not whether [the employee]'s drug use itself violates public policy, but whether the agreement to reinstate him does so."[4] Subsection (d)(1) of the legislation incorporates into Wisconsin law this clear and narrow test as articulated by Justices Scalia and Thomas.

The bill adopts another key principle developed by the US Supreme Court's cases---that "the parties bargain for the judgment of the arbitrator--correct or incorrect--whether that judgment is one of fact or law."[5] It is intended to remind judges that they should not review an arbitrator's decision like an appeals judge reviews a trial court's decision. As one federal appellate court put it, the question is not whether the arbitrator "erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract."[6]

The legislation also incorporates a longstanding policy set by the US Supreme Court that disputes whether proper procedures, such as time limits for filing a grievance have been followed, are never appropriate for judicial review.[7] In the Baldwin-Woodville case, three Court of Appeals judges and one Supreme Court justice disregarded this basic rule, which federal courts have followed for over 45 years.

Assembly Bill 609 is needed to overturn the decisions of judges who have departed from well-settled rules and precedent, and to provide guidance to judges who face these kinds of cases in the future. WEAC believes that the narrow standards of review in the legislation will discourage unfounded challenges to arbitration decisions and promote arbitrations as providing the final and binding resolution of disputes arising under labor agreements.

If you have any questions, contact Deb Sybell, WEAC Legislative Program Coordinator, at (608) 298-2327.

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[3] Cedarburg Education Association v. Cedarburg Board of Education, 2008 WI App 135, ¶ 21 ("arbitration award violated the strong public policy against immoral conduct in schools").
[4] Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, 531 U.S. 57, 62-3 (2000).
[5] City of Oshkosh v. Oshkosh Public Library Clerical and Maintenance Employees Local Union 796-A , 99 Wis.2d 95, 130 (Wis. 1980).
[6] Hill v. Norfolk & Western Railways, 814 F.2d 1192, 1194 (7th Cir. 1987).
[7] John Wiley & Sons v. Livingston, 376 U.S. 543, 557-8 (1964).

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Wisconsin Council 40 AFSCME
We Make Communities Happen

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Richard Badger
Executive Director

Testimony of Martha Merrill

Lead Research Analyst, AFSCME Council 40

In Favor of Assembly Bill 609

Assembly Committee on Labor

January 13, 2010

Chair Sinicki, members of the committee, thank you for the opportunity to speak here today. My name is Martha Merrill and I am the Lead Research Analyst for AFSCME Council 40. Council 40 represents approximately 33,000 employees in the State of Wisconsin. These employees are members in over 600 bargaining units. Virtually all of these bargaining units have contracts which contain final and binding arbitration to resolve workplace disputes. We would like to register our support of Assembly Bill 609.

Arbitration is recognized as the favored method of dispute resolution to address conflicts that arise between unions and employers. The arbitration process is prompt, peaceful, efficient and inexpensive. Further, it is a process to which the parties have collectively bargained and mutually agreed. In agreeing to this procedure as the method of resolving disputes, the parties utilize the expertise of a neutral arbitrator and accept his or her view of the facts and meaning of the contract.

In matters of conflict resolution deference has been given to the arbitration process and also the judgment of the arbitrator. Arbitrators are chosen because of their understanding of industrial relations and their expertise in interpreting and administering labor contracts. They realize that the purpose of arbitration is to resolve the contractual issue at hand, not to dissect the labyrinth of potential legalist theories. In the event of an appeal, courts have traditionally recognized their limited role in reviewing the decisions of an arbitrator. This established role is to provide, if necessary, review of the conduct of the arbitrator, not a re-litigation of the factual matters.

In 2008 the Wisconsin appellate courts vacated three arbitration decisions relating to collective bargaining agreements. These appeal cases indicate an alarming trend of erosion of the arbitration process's integrity. Such drawn-out legal disputes do not promote the parties' best interests. The arbitration process must remain a mechanism to quickly address conflicts that arise in the workplace. This method promotes labor peace and is an efficient use of scare resources. This process has worked well without interference for decades.

If an arbitrator's award is to be considered final and binding as is intended by the parties, court intervention must remain limited. Maximum deference should be given to the decision of the arbitrator. Circumstances that allow courts to vacate an arbitrator's ruling must be narrow. Assembly Bill 609 establishes clear standards for the judicial review of arbitration decisions. AFSCME Council 40 believes that the provisions of Assembly Bill 609 are critical to maintaining the integrity of the arbitration process.

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We would like to thank Representatives Kessler and Williams and Senator Taylor for bringing this important legislation forward and AFSCME Council 40 urges the members of the committee to recommend Assembly Bill 609 for passage Thank you, and we'll be happy to take any questions.